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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332)	
of the Communications Act)	
)	
Regulatory Treatment of Mobile Services)	

THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 10, 1995

Released: May 5, 1995

Comment Date: June 5, 1995

Reply Comment Date: June 26, 1995

By the Commission:

1. In this Third Further Notice of Proposed Rule Making, we propose to amend our 45 MHz spectrum cap for cellular telephone service, Specialized Mobile Radio (SMR) service, and broadband Personal Communications Service (PCS). While the spectrum cap currently applies only to licensees in these services who are classified as Commercial Mobile Radio Service (CMRS) providers, we propose to extend it to all cellular, SMR, and broadband PCS providers regardless of their regulatory classification. We also seek comment on applying the spectrum cap to those "grandfathered" SMR licensees who continue to be regulated as Private Mobile Radio Service (PMRS) providers until August 10, 1996.

2. When we initially proposed the spectrum cap in the *Further Notice of Proposed Rule Making* in this proceeding,¹ we framed the issue in terms of aggregation of CMRS

¹ *Further Notice of Proposed Rule Making*, GN Docket No. 93-252, 9 FCC Rcd 2863 (1994) (*Further Notice*).

spectrum, and did not address aggregation of PMRS spectrum.² In the *Further Notice* we proposed a broad-based spectrum cap covering all CMRS, or alternatively, a more limited cap that would apply to CMRS providers in specified services only, *i.e.*, cellular, SMR, and broadband PCS.³ We did not address the issue of whether licensees in these services providing Private Mobile Radio Service (PMRS) should also be subject to the cap. On August 9, 1994, in the *Third Report and Order* in this proceeding, we applied the cap only to cellular, SMR, and broadband PCS services.⁴ As adopted, the cap was limited to cellular, SMR, and broadband PCS licensees whose activities are regulated as CMRS.⁵

3. Because the spectrum cap is limited to CMRS providers in the three affected services, it leaves open the possibility that licensees could avoid the cap by providing PMRS as opposed to CMRS offerings.⁶ We question whether the applicability of the spectrum cap should turn on the CMRS/PMRS distinction, however. In the *Third Report and Order*, we concluded that a cap was needed for cellular, SMR, and broadband PCS because of the potential for licensees to aggregate large amounts of spectrum in these services, thereby limiting the availability of spectrum to other competitors in the mobile services market.⁷ We note that this potential for a licensee to reduce the number of competitors by aggregating spectrum exists regardless of whether the licensee is providing CMRS or PMRS. Moreover, the services provided by PMRS providers may well be viewed as competitive alternatives to CMRS by customers; thus, excluding them from the cap could provide PMRS providers with an unfair competitive advantage over CMRS providers. Finally, even if most cellular, SMR, and broadband PCS providers provide CMRS services, as is likely to be the case, determining the precise amount of CMRS spectrum that should be attributed for spectrum cap purposes is likely to be difficult, particularly in the case of PCS, SMR, and possibly cellular licensees who provide both CMRS and PMRS offerings under a single authorization.

4. For all of these reasons, we propose that the 45 MHz spectrum cap be revised to apply to all cellular, SMR, and broadband PCS licensees regardless of regulatory

² CMRS is defined as any service that is: (1)(A) provided for profit; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1). PMRS is defined as a mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. See 47 C.F.R. § 20.3.

³ *Id.*, paras. 92-96.

⁴ *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*Third Report and Order*).

⁵ *Id.*, para. 263.

⁶ SMR and PCS licensees may already offer non-CMRS services. Cellular licensees may not currently offer non-CMRS services, although several pending petitions for reconsideration of the *Second Report and Order* in this docket urge the Commission to lift this restriction.

⁷ *Third Report and Order*, paras. 258-260.

classification. We believe that such a revision will greatly simplify the application of the cap and will provide greater certainty regarding its effect to cellular, SMR, and broadband PCS applicants and licensees. We seek comment on this proposal. Moreover, in light of our proposal, we seek comment on whether there is any need to delay the applicability of the spectrum cap until August 10, 1996 for "grandfathered" SMR licensees, who will continue to be regulated as PMRS providers until that time. When we adopted the CMRS-only spectrum cap in the *Third Report and Order*, we stated that this issue warranted further examination.⁸ If we decide to extend the cap to SMR licensees classified as PMRS, however, this rationale for delaying the applicability of the cap to grandfathered SMR licensees appears not to apply.⁹ We seek comment on this analysis.

5. Initial Regulatory Flexibility Analysis. We certify that the Regulatory Flexibility Act of 1980 does not apply to this proceeding. Any action taken as a result of this *Third Further Notice of Proposed Rule Making* is unlikely to have a significant economic effect on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act, because the proposed change is minor and because entities that acquire 45 MHz of spectrum in a given geographic market are unlikely to be small businesses. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

6. Ex Parte Rules - Non-Restricted Proceeding. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

7. Comment Dates. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 5, 1995, and reply comments on or before June 26, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239,

⁸ *Third Report and Order*, para. 283.

⁹ Applying the spectrum cap to grandfathered SMR licensees would not require them to divest current license holdings or prevent them from seeking to obtain PCS licenses in the upcoming auctions. In the *Third Report and Order*, we stated that SMR licensees who exceeded the spectrum cap by acquiring broadband PCS licenses would not be required to divest until after the auction (within ninety days of the license grant). See *Third Report and Order*, paras. 283-285. 47 CFR § 20.6(e).

1919 M Street, N.W., Washington, DC 20554.

8. For further information about this *Notice*, contact Lisa Warner, Legal Branch, Commercial Radio Division, Wireless Telecommunications Bureau, (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "William F. Caton".

William F. Caton
Acting Secretary